MOTION FILED
NOV 16 1989

No. 88-1897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and
COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of the brief. Respondents have denied consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici are concerned that unless the Court reverses the judgment below, the progress that state and local governments have begun to make in their fight against drunk driving will be set back severely. *Amici*'s members have worked over the past decade to create multi-faceted programs designed to educate the public about the horrors of drunk driving and to deter motorists from driving drunk. Some of *amici*'s members have incorporated sobriety checkpoints into their programs and others have not. But all consider it imperative that they be allowed to maintain the flexibility to decide whether sobriety checkpoints can play a useful role as part of their comprehensive programs to curb drunk driving within their particular jurisdictions.

Amici are also concerned about the aggressive approach that the Michigan courts took in assessing the State's determination that sobriety checkpoints are an effective tool in the fight against drunk driving. The courts below showed absolutely no deference to the State's decision, and instead relied exclusively on a single expert witness who called the program's efficacy into question. It was in the name of enforcing the dictates of the federal Constitution that the Michigan courts conducted this intensive second-guessing of the State's assessment that a particular law enforcement technique would deter criminal conduct. The courts' approach, however, was fundamentally at odds with the core principles of representative democracy that make that Constitution so unique. *Amici* submit that this Court should use this opportunity to declare once again the appropriate role for the courts in assessing a determination by a politically accountable branch that a particular law enforcement technique is likely to prove effective.

Because the issues presented by this case are of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of petitioners.

Respectfully submitted,

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November 16, 1989

QUESTION PRESENTED

Whether the Fourth Amendment prohibits a State from instituting a sobriety checkpoint program when an official State Task Force has determined that the program is a potentially vital element in the State's comprehensive drunk driving program, and when the checkpoint program affords police absolutely no discretion in deciding which motorists to stop and causes only minimal interference with lawful motorists' passage.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. SOBRIETY CHECKPOINTS ARE WIDELY RECOGNIZED AS IMPORTANT TOOLS IN STATE AND LOCAL GOVERNMENTS' BATTLE AGAINST DRUNK DRIVING	4
II. STRUCTURED USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION OF UNREASONABLE SEIZURES	7
A. The Fight Against Drunk Driving Is A Matter Of Paramount Public Concern	8
B. Sobriety Checkpoints Advance The Public Interest In Deterring And Preventing Driving Under The Influence Of Alcohol	9
1. *The Michigan courts erred in demanding that the State present unequivocal empirical evidence to support the State's conclusion that sobriety checkpoints are important elements in its campaign against drunk driving*	9
2. *The Michigan courts erred in demanding that the State demonstrate the unavailability of other less-intrusive alternatives*	13

TABLE OF CONTENTS—Continued

	Page
3. *There is more than ample evidence that sobriety checkpoints are effective elements in anti-drunk-driving programs*	16
C. Structured Sobriety Checkpoints Involve A Minimal Degree Of Intrusion And Interference	22
1. *The sobriety checkpoints at issue here do not leave officers any discretion in determining which cars to stop*	23
2. *Sobriety checkpoints result in only minimal objective and subjective intrusion into Fourth Amendment interests*	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:

	Page
Bell v. Wolfish, 441 U.S. 520 (1979)	22
Brown v. Texas, 443 U.S. 47 (1979)	7, 8, 23, 24
California v. LaRue, 409 U.S. 109 (1972)	13
Camara v. Municipal Court, 387 U.S. 523 (1967)	20, 29
City of Newport v. Iacobucci, 479 U.S. 92 (1986) (per curiam)	13
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	10
Commonwealth v. Leninsky, 360 Pa. Super. 49, 519 A.2d 984 (1986)	19
Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035 (1987)	19
Delaware v. Prouse, 440 U.S. 648 (1979)	14, 22, 23, 24, 25, 27
Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984)	17
Gregg v. Georgia, 428 U.S. 153 (1976)	11
Ingersoll v. Palmer, 43 Cal.3d 1321, 241 Cal. Rptr. 42, 743 P.2d 1299 (1987)	9-10
Little v. State, 300 Md. 485, 479 A.2d 903 (1984)	10, 29
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Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985), cert. denied, 475 U.S. 1084 (1986)	10
Marshall v. United States, 414 U.S. 417 (1974)	15
National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989)	*passim*
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	12
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)	13
Pennsylvania v. Mimms, 434 U.S. 106 (1977)	7
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TABLE OF AUTHORITIES—Continued

Page

State v. Garcia, 481 N.E.2d 148 (Ind. App. 1st Dist. 1985), aff'd, 500 N.E.2d 158 (Ind. 1986) ..12-13, 21
State v. Martin, 145 Vt. 562, 496 A.2d 442 (1985) .. 10
State v. Pima County Superior Court, 143 Ariz. 45, 691 P.2d 1073 (1984) 9
Stone v. Powell, 428 U.S. 465 (1976) 13
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 22, 26, 27
United States v. Hernandez, 739 F.2d 484 (9th Cir.), cert. denied, 469 U.S. 1021 (1984) 28-29
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) .....*passim*
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CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. IV .....*passim*
U.S. Const. Amend. XXI 13
Mich. Const. Art. I, § 11 3

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Alcohol, Drugs and Driving, Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources, 97th Cong., 2d Sess. (1982) 8
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TABLE OF AUTHORITIES—Continued

Page

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	Page
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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Like so many other state and local governments, Michigan has determined that traditional law enforcement techniques alone are inadequate to deal with the problem of drunk driving. In 1984, the Michigan legislature created the Michigan Drunk Driving Task Force, consisting of representatives from the State's executive, legisla-

tive, and judicial branches, as well as various citizen representatives. The Task Force was charged with the responsibility of reviewing and making recommendations to the governor and legislature "relative to all aspects of the drunk driving problem in Michigan." Act No. 348, Public Acts of 1984 (Dec. 26, 1984). In 1985, the Task Force issued its report, which contained thirty-five recommendations for action, including the recommendation that sobriety checkpoints be used on a trial basis. Michigan Drunk Driving Task Force, *Final Report* 26 (1985). In his January 1986 State of the State Address, Michigan Governor James J. Blanchard called upon the Department of State Police to implement the Task Force's recommendation regarding sobriety checkpoints.

Before instituting the trial checkpoint program, the Department of State Police established an advisory committee to develop guidelines for the constitutional implementation of the program. These guidelines significantly constrain police discretion in determining where checkpoints will be located and in operating the checkpoints. For example, the checkpoint sites are chosen on the basis of "criteria, as approved by the Director of the Department of State Police, which consider the previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data." Pet. App. 148a. The guidelines are also explicit and detailed in prescribing the officers' and supervisors' responsibilities.[1]

With these guidelines in force, the Department announced its plan to conduct the first of its checkpoint programs on May 17, 1986. One day before that checkpoint was established, respondents filed this action in the Wayne County Circuit Court, alleging that the proposed checkpoint program violated both the federal and state Constitutions, and requesting a preliminary injunction against petitioners. On May 17, Michigan conducted its

[1] Some details of these constraints are described *infra* pages 23-24, 27-28.

one and only checkpoint operation. The checkpoint operated for less than an hour due to inclement weather; during that time 126 motorists were stopped for an average period of twenty-five seconds each, and two motorists were arrested for driving under the influence of alcohol.

After holding hearings on the program's constitutionality in late May and early June 1986, the trial court entered a permanent injunction barring Michigan from utilizing sobriety checkpoint programs. The primary basis for the court's determination that sobriety checkpoint programs violate both the federal and state constitutions was the testimony of respondents' expert, H. Lawrence Ross, a Professor of Sociology at the University of New Mexico. The court was persuaded that sobriety checkpoint programs are not particularly effective tools in combating drunk driving. The court also believed that the temporary location of the checkpoints added to the fear and fright that law-abiding motorists would experience.

The Michigan Court of Appeals affirmed, holding that the trial court's determinations were not clearly erroneous. The court modified the holding, however, declaring that the ruling was based solely on the federal Constitution. Pet. App. 24a-25a.

SUMMARY OF ARGUMENT

Over the last decade, sobriety checkpoint programs have become a recognized tool in battling drunk driving. A series of federal and state commissions and task forces has concluded that checkpoint programs can play a critical role as part of state and local governments' comprehensive anti-drunk-driving programs.

The Michigan courts overstepped their appropriate role when they rejected this consensus and declared that they were not convinced that sobriety checkpoint programs are very effective tools in battling drunk driving. In evaluating the constitutionality of a neutral questioning or testing program, such as the ones this Court has upheld with respect to alien checkpoints and drug testing, a court, of course, must satisfy itself that the program reasonably

advances the government's stated interests. But a court should not demand, and this Court has never demanded, unqualified empirical evidence to support a State's conclusion that the technique will work or that it is an important facet of the State's program. Nor should a court require the State to show that no other program or combination of programs could accomplish the State's goal in some less intrusive way.

The Michigan courts also exaggerated the level of intrusion caused by structured sobriety checkpoints. Because these programs are designed to eliminate police discretion in deciding whom to stop, sobriety checkpoints do not raise the classic Fourth Amendment concern with the possible abuse of unbridled discretion. Moreover, the brief, public, and routine stops involved in this case do not raise the specter that individual motorists will experience fear or fright, as they might upon being pulled over by an officer conducting a roving patrol.

ARGUMENT

I. SOBRIETY CHECKPOINTS ARE WIDELY RECOGNIZED AS IMPORTANT TOOLS IN STATE AND LOCAL GOVERNMENTS' BATTLE AGAINST DRUNK DRIVING.

Since the beginning of the automobile age, state and local governments have been fighting an uphill battle against the horrors of drunken driving. The death and injury tolls are astounding. In 1986, for example, approximately 24,000 people died in alcohol-related car accidents. See National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 6 (1987). In recent years, governments have become increasingly active in attempting to design programs to change public attitudes toward the abominable combination of alcohol and automobiles, and to deter those who might be inclined to drive drunk. The challenge that state and local governments face is great, for, as the Presidential Commission on Drunk Driving concluded, "driving under the influence is basically a State and local problem for which State and local solutions must be found." Presidential Commission on Drunk Driving, *Final Report* 4 (1983).

Sobriety checkpoints are one of the critical tools that many state and local governments have utilized in combating drunk driving. These checkpoints have been used in conjunction with a variety of other state and local programs designed to improve public awareness of the scope of the drunk driving problem and to bolster enforcement of drunk driving laws. Many other facets of these programs are less costly than sobriety checkpoints. Yet it has been widely recognized that sobriety checkpoints serve a unique function in educating the public about society's resolve against drunk driving, and in particular, enhancing a drunk driver's perception that he may be caught. Focusing on the value of general deterrence programs—"those designed to raise the perceived risk of arrest and sanctioning by the vast majority of drunk drivers who are never arrested"—a National Highway Traffic Safety Administration ("NHTSA") study concluded that "the general deterrence approach has the greatest potential for achieving a substantial, short-term reduction in alcohol-related crashes. . . . The general deterrence approach is also an essential aspect of any long-term solution to the problem." NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 1 (DOT HS 806-476, 1983). That same study describes the pivotal role that sobriety checkpoints play in the deterrence process, concluding that "safety checkpoints can provide an important component of an effective enforcement system designed to raise the perceived probability of apprehension for DWI." *Id.* at 2.

This NHTSA study is but one in a long series of commissions and studies that has recognized the unique value of sobriety checkpoints in deterring drunk driving. For example, on the federal level, the Presidential Commission on Drunk Driving urged state and local governments to "take a *general deterrence approach*" to the drunk driving problem, and to use sobriety checkpoints "to achieve

a high perception of risk of detection for driving under the influence." *Final Report* at 5, 15 (emphasis in original). Similarly, NHTSA has recognized that roadside checks have been successfully used in various States and "are particularly effective in increasing the public perception of the risk of being caught for drunk driving." NHTSA, *Incentive Grant Criteria for Alcohol Traffic Safety Programs*, 48 Fed. Reg. 5545, 5550 (Feb. 7, 1983). The National Transportation Safety Board ("NTSB") has likewise concluded that sobriety checkpoint procedures are "potentially effective deterrent measures that warrant broader application by the States." NTSB, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* 21 (1984). Many state commissions have reached similar conclusions about the efficacy of sobriety checkpoints.[2]

Consistent with this national consensus about the need to develop additional tools to deal with the drunk driving problem, the Michigan legislature created the Michigan Drunk Driving Task Force. The Task Force conducted five public hearings to obtain information and to gauge reaction to the proposed use of sobriety checkpoints. To evaluate whether sobriety checkpoints should be instituted in Michigan, the Task Force conducted a survey of Michigan drivers in which the majority of respondents "reported that they would be less likely to drink as much

[2] See, *e.g.*, Hingson, *1987 Massachusetts/New Hampshire Road Block Surveys* (Massachusetts Governor's Highway Safety Bureau 1987); Highway Safety Policy Research Project, *An Assessment of Drunk Driving Policies in Texas and Other States* 34 (1985); Epperlein, *The Use of Sobriety Checkpoints As a Deterrent: An Impact Assessment* (State of Arizona Statistical Analysis Center 1985); *Interim Report of the Illinois DUI Task Force* 12-13 (Dec. 1984); The Governor's Task Force to Combat Drunk Driving, *Action Plan to Combat Drunk Driving in Virginia: A Preventable Loss* 37 (July 1983); The Governor's Task Force on Alcohol Abuse and Highway Safety, *Alcohol Abuse and Highway Safety in Massachusetts* 39-40 (March 1982); Governor's Alcohol and Highway Safety Task Force, *DWI: Driving While Intoxicated* 11 (New York 1981/1982).

when driving if sobriety checkpoints were implemented in Michigan." Michigan Drunk Driving Task Force, *Final Report* 13 (1985). The Task Force also surveyed each of the fifty States to assess the experience that other state and local governments have had with sobriety checkpoints. With the benefit of this information, the Task Force recommended "that in concert with the 1983 Report of the Presidential Commission Against Drunk Driving, the National Transportation Safety Board, and the National Commission On Drunk Driving, the use of temporary sobriety checklanes be used on a trial basis." *Id.* at 26. According to the data gathered by the Task Force, Michigan thus became the thirty-sixth State in which state or local government officials have used checkpoints in battling drunk driving.[3]

II. STRUCTURED USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION OF UNREASONABLE SEIZURES.

This Court has repeatedly recognized that the "reasonableness of seizures that are less intrusive than a traditional arrest . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Brown v. Texas*, 443 U.S. 47, 50 (1979) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). In *Brown*, the Court identified three factors that enter this balance: "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty." 443 U.S. at 51. All three of these factors weigh heavily in favor of the reasonableness of Michigan's sobriety checkpoint program.

[3] A report of the National Commission Against Drunk Driving suggests that Michigan's count was low and that checkpoints have been utilized, to some extent, in 50 States and Territories. National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 4 (1986).

A. The Fight Against Drunk Driving Is A Matter Of Paramount Public Concern.

It is surely unnecessary to elaborate on just how momentous a threat drunk driving poses to public health and safety. As this Court has observed, "[t]he carnage caused by drunk drivers is well documented and needs no detailed recitation." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). Although the numbers are known to be enormous, it may be difficult to comprehend the magnitude of the statistics standing alone. Thus, comparing them with some other recognized threats helps put the gravity of the danger in perspective. In 1986, there were 24,000 alcohol-related automobile deaths in the United States as compared to 20,610 murders.[4] Similarly, during 1986 and 1987 more Americans lost their lives in alcohol-related automobile accidents than were killed in the entire course of the Vietnam war.[5] As would be expected, of all the courts that have evaluated sobriety checkpoints under the *Brown* balancing test, not one has ever questioned the magnitude of the drunk driving problem or the critical importance of establishing effective measures to deter drunk drivers.[6]

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[4] See United States Department of Justice, *Sourcebook on Criminal Justice Statistics 1988* at 427 (1989); National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 6 (1987).

[5] See United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* at 336 (1989); see generally *Alcohol, Drugs and Driving, Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. (1982).

[6] The gravity of the interest in keeping alcohol-impaired drivers off the road is far more acute than the Customs Service's interest in not promoting officers who use drugs, which the Court found to be "substantial" in *National Treasury Employees Union v. Van Raab*, 109 S.Ct. 1384, 1390 (1989). Unfortunately, Justice Scalia's observation that there was no evidence "of *even a single instance* in which any of the speculated horribles actually occurred" (*id.* at 1400 (Scalia, J., dissenting) (emphasis in original)), is not applicable to the devastating effects of alcohol-related traffic accidents, which claim more than 60 lives a day.

B. Sobriety Checkpoints Advance The Public Interest In Deterring And Preventing Driving Under The Influence Of Alcohol.

Given the strong national consensus that has developed about the utility of sobriety checkpoints, it seems obvious that Michigan had more than a reasonable basis for concluding that such checkpoints are effective elements in the battle against drunk driving. Yet the Michigan Court of Appeals held that the trial court was "not clearly erroneous" in concluding that sobriety checkpoints are not effective long-term deterrents. Pet. App. 12a. This mistaken conclusion about the ineffectiveness of sobriety checkpoints formed the core of the lower courts' reasoning. This core was severely flawed, though, because the Michigan courts not only grossly overstepped the bounds of the appropriate judicial role in overriding a State's determination that a law enforcement device would be an effective component of a comprehensive deterrence program, but also misapprehended the state of knowledge on the subject of sobriety checkpoints.

1. *The Michigan courts erred in demanding that the State present unequivocal empirical evidence to support the State's conclusion that sobriety checkpoints are important elements in its campaign against drunk driving.*

The Michigan courts fundamentally misconceived the limited role that the Constitution affords them in examining the efficacy of sobriety checkpoints. What the courts should have done was to ask whether there was reasonable support for the State's conclusion that a sobriety checkpoint program would help advance the goal of deterring and detecting drunk driving. Had the courts asked the question in that way, they most assuredly would have decided, as so many other courts have,[7] that the

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[7] See, *e.g.*, *State v. Pima Cty. Superior Ct.*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-1077 (1984); *Ingersoll v. Palmer*, 43 Cal.3d

sobriety checkpoint program was a reasonably effective facet of an overall anti-drunk-driving program. Instead, the Michigan courts engaged in full-fury scrutiny of the State's justifications for sobriety checkpoints, ultimately declaring that there was insufficient empirical evidence to support the State's studied conclusion that sobriety checkpoints can serve as long-term deterrents to drunk driving.[8]

This super-strict scrutiny of the State's determination that sobriety checkpoints are a worthwhile measure is inconsistent with the role that courts in our form of government should play in assessing the reasonableness of a nondiscretionary program such as this. For example, in *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), this Court upheld Federal Railroad Administration ("FRA") regulations that require alcohol and drug testing of all railway personnel involved in certain train accidents. In assessing whether the tests promoted the FRA's goals of deterring alcohol and drug use and discovering the cause of accidents, the Court concluded that the regulations were "reasonably related to the Government objectives that support them." *Id.* at 1421. In keeping with this tone of inquiry, the Court specifically refused to "second-guess the reasonable conclusions drawn by the FRA after years of investigation and study." *Id.* at 1419 n.9. In contrast, the Michigan courts in this case

1321, 1339-1341, 241 Cal. Rptr. 42, 55, 743 P.2d 1299, 1311 (1987); *People v. Bartley*, 109 Ill.2d 273, 286-287, 486 N.E.2d 880, 886 (1985), cert. denied, 475 U.S. 1068 (1986); *Little v. State*, 300 Md. 485, 505-506, 479 A.2d 903, 913 (1984); *People v. Scott*, 63 N.Y.2d 518, 526-527, 483 N.Y.S.2d 649, 653, 473 N.E.2d 1, 4 (1984); *Lowe v. Commonwealth*, 230 Va. 346, 352, 337 S.E.2d 273, 277 (1985), cert. denied, 475 U.S. 1084 (1986); *State v. Martin*, 145 Vt. 562, 569, 469 A.2d 442, 447 (1985).

[8] At one point, the trial court seemed to demand something "close to unqualified support" for the State's conclusion that sobriety checkpoints are effective. Pet. App. 87a. This unyielding approach departs markedly from this Court's evaluation of regulations affecting even First Amendment rights. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (city may rely on evidence that it "reasonably believed to be relevant to the problem that the city addresses.").

showed absolutely no deference to the State's reasoned conclusions, or to the assessments of the dozens of federal and state commissions and task forces that have found sobriety checkpoints to be important elements in the anti-drunk-driving campaign.

The notion that a court should take it upon itself to assess independently the efficacy of a single element of a State's program is especially problematic when the question turns on whether the element, properly analyzed in its programmatic context, has a sufficient deterrent impact. Whether a given procedure does or does not deter behavior is always a difficult question, one that often divides the social science and academic communities, and is well outside the confines of appropriate judicial decisionmaking. Indeed, dealing with no less critical an issue than the constitutionality of capital punishment, the plurality in *Gregg v. Georgia*, 428 U.S. 153 (1976), observed that "[a]lthough some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). Hence, the plurality concluded that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Id.* at 186.[9]

The importance of allowing state and local governments to adapt programs to suit their own citizens and circumstances, as described in *Gregg*, or even to experiment with new programs, is a central theme in our federal system.

[9] It is of no constitutional import that Michigan's decision to implement sobriety checkpoints at this time was an executive branch decision, as opposed to a legislative determination. The trial court held, as a matter of Michigan law, that the legislative branch delegated authority to the police to adopt checkpoint programs. Pet. App. 40a-42a.

As Justice Brandeis wrote, "one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory . . . . This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Michigan courts ignored these principles when they afforded the State absolutely no flexibility to experiment with sobriety checkpoints. Moreover, by enjoining a test program designed to assess the effectiveness of sobriety checkpoints *in Michigan*, the courts made it impossible for the State to gather the very evidence that the courts would have considered most relevant to the constitutional issue.

The catch-22 nature of demanding more empirical evidence but forbidding the State to gather it is unmistakable. Under this approach, no State could ever pioneer in the use of new law enforcement techniques because, by definition, such programs would not yet have been proven useful. Under this theory, the checkpoints that the Court held to be constitutionally valid in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), must have been operating unconstitutionally up until the time that enough aliens had been detected to provide an empirical basis for the checkpoint's utility. Such an approach is absurd. The constitutionality of sobriety checkpoints and other innovative law enforcement techniques must not be made to turn on the fortuity of whether a plaintiff attacks them before or after they have had a chance to demonstrate their value. As the Illinois Supreme Court noted in upholding the use of sobriety checkpoints: "With the cost in human life so high, we do not believe that we would be accurately balancing the factors involved were we to delay approval of this technique and condone the further loss of life while the statistics were being developed." *People v. Bartley*, 109 Ill.2d at 286, 486 N.E.2d at 886; see also *State v. Garcia*, 481 N.E.2d 148, 153-154 (Ind. App. 1st Dist. 1985) ("Since our roadblock program is new, time must elapse

to generate statistics upon which a comparison can be made."), aff'd, 500 N.E.2d 158 (Ind. 1986).

A court need not, of course, accept a wholly unsupportable claim that a program has deterrent impact, or will otherwise be effective in addressing an important social problem. But a court serves its function when it determines that there is plausible support for the State's conclusion that the measure furthers its stated goals. Thus, in *Skinner*, the Court relied on "the railroad industry's experience" and "common sense" in concluding that post-accident alcohol and drug testing would deter abuse by increasing the likelihood that abusers would be discovered. 109 S.Ct. at 1419. These same factors of experience and, above all, common sense,[10] compel the conclusion that state and local governments' use of sobriety checkpoints are significant elements in their overall programs to combat drunk driving.[11]

2. *The Michigan courts erred in demanding that the State demonstrate the unavailability of other less-intrusive alternatives.*

Aside from its unwarranted second-guessing of Michigan's decision that sobriety checkpoints would further the State's goals, the Michigan courts also faulted the program

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[10] It is this common-sense attitude, and not any abundance of empirical evidence, that has driven this Court's recent approach to the exclusionary rule in its Fourth Amendment jurisprudence. See *Stone v. Powell*, 428 U.S. 465, 492 (1976) ("Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.").

[11] Deference to the State's assessment is especially appropriate in cases where the State takes action pursuant to its authority to regulate the consumption of alcohol. This Court has held that the Twenty-first Amendment's unique grant of authority requires the courts to afford an "added presumption in favor of the validity" of state regulation of alcohol. *California v. LaRue*, 409 U.S. 109, 118-119 (1972); see also *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981).

because, in the words of the trial court, "there exist alternative means available to the defendants in their efforts to curb drunk driving." Pet. App. 102a. This demand that the State prove the unavailability of other feasible means to advance its goals is wholly inconsistent with the approach this Court has adopted. The Court spoke to this precise issue last Term in *Skinner*:

> Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." . . . We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). See also *Colorado v. Bertine*, 479 U.S. 367, 373-374 (1987). It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . ."

Skinner, 109 S. Ct. at 1419 n.9 (parallel citations omitted), quoting *Martinez-Fuerte*, 428 U.S. at 556-557 n.12. The Michigan courts' demanding search for less intrusive methods that might advance the State's interest is precisely the kind of inquiry that the Court so unequivocally condemned in *Skinner* and previous cases.

There is good reason for the Court's refusal to engage in aggressive scrutiny of a state or local government's claim that a neutral program, such as the checkpoints at issue here, effectively promotes important interests: the State has absolutely nothing to gain by using an ineffective measure. These programs are not at all similar to discretionary law enforcement mechanisms, such as the suspicionless stops in *Delaware v. Prouse*, 440 U.S. 648 (1979), which raise "grave danger that . . . unreviewable discretion [will] be abused by some officers in the field."

Martinez-Fuerte, 428 U.S. at 559. This same concern with controlling discretion necessitates a neutral determination of probable cause prior to a typical search, in order to ensure that society's passion for solving crime does not drive it to trample on an individual suspect's rights, especially when there is a risk that police discretion in such circumstances may "be sensitive to social station and other factors that should not bear on the decision." J. Ely, *Democracy and Distrust* 97 (1980). But the concern that the State may be undervaluing the rights of some segment of its population (such as youths or some racial or ethnic minority) is wholly absent in the case of a neutral program that subjects all citizens, rich and poor, powerful and powerless, to the same brief inconvenience of a sobriety checkpoint. Because they are accountable to their citizens, state and local governments are made to bear the full brunt of any economic and political costs associated with such programs. If they nonetheless decide to proceed with them, as so many have, there is absolutely no reason for courts to suspect that they are driven by anything but a good-faith effort to curb drunk driving. To borrow from one of the Court's equal protection decisions: "It should be recognized that the classification selected by Congress is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices." *Marshall v. United States*, 414 U.S. 417, 428 (1974).

Perversely, instead of affording some degree of deference to the State's conclusions about the efficacy of sobriety checkpoints, the trial court actually appeared to discount the value of the state officials' testimony. The court suggested that their testimony was somehow biased because the state officials had an "interest in the outcome of the litigation." Pet. App. 94a. This aggressive mistrust of a State's reasoned determinations is entirely misplaced in reviewing a program carefully crafted by the

State to cope with one of the major health and safety issues facing America today.

3. *There is more than ample evidence that sobriety checkpoints are effective elements in anti-drunk-driving programs.*

Scores of studies conducted by federal agencies and federal commissions,[12] state agencies, and state commissions[13] have concluded that sobriety checkpoints are important elements in the arsenal against drunk driving. Given this broad consensus, respondents have an exceedingly heavy burden to bear if they are to attack successfully the State's conclusion that sobriety checkpoints promote vital state interests. In assessing whether respondents have met that exceptional burden, this Court is, of course, not bound by any conclusions that the lower courts reached. See *Lockhart v. McCree*, 476 U.S. 162, 168-169 n.3 (1986) (discussing Court's role in evaluating "legislative facts," particularly when courts have split in their assessment of data). Whether sobriety checkpoints are a useful facet of state programs to deter drunk driving is an issue of legislative fact, not an issue about which a court can rule based on a battle of expert witnesses paraded before it. As the Fifth Circuit has written: "If

[12] See, *e.g.*, Lacey & Lucke, *Enforcement and Public Information Strategies for DWI General Deterrence: The Boise City, Idaho Experience: Final Report* 81 (DOT/NHTSA 1987) (in order to enhance general deterrence, "highly visible enforcement strategies such as checkpoints should be employed if at all possible"); Lacey, Stewart, Marchetti, Popkin, Murphy, Lucke & Jones, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience: Final Report* 66 (DOT/NHTSA 1986) (coordinated enforcement and public information program that included sobriety checkpoints significantly reduced alcohol-related and nighttime crashes); Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations: Final Report* 47-49 (DOT/NHTSA 1985) (Charlottesville checkpoint program found to be effective in increasing the perceived risk of arrest, reducing reported incidence of drinking and driving).

[13] See *supra* note 2.

the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact." *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion), cert. denied, 467 U.S. 1259 (1984).

When the Michigan Court of Appeals affirmed the trial court's ruling based on the "clearly erroneous" standard of review, it ignored the essential character of legislative facts such as these. Instead of deferring to the lower court's conclusions, and upholding them unless they were clearly erroneous, the court of appeals should have deferred to the State's conclusions, and upheld them unless they were clearly erroneous. The fact is, however, that no matter what standard of review is employed, Michigan's conclusion that sobriety checkpoints are effective stands up to inquiry.[14]

The basic goal of sobriety checkpoints is to increase public perception that drunk drivers will be caught, and thus, combined with other facets of the campaign against drunk driving, to deter people from drinking and driving. Those who have attacked checkpoint programs often have claimed that these goals can be equally well served through enhanced use of roving patrols, in which officers stop any driver whose erratic driving provides reasonable suspicion that he is intoxicated. The trial court in this case seemed to take this position, proclaiming that "conventional law enforcement methods, when utilized in conjunction with campaigns to increase the public awareness of the problem of drunk driving, were shown to be effective methods of curbing drunk driving." Pet. App. 98a. There are two basic reasons, however, why roving patrols do not, and

[14] In the improbable event that the Court were to find that there is insufficient evidence to sustain the Michigan program, or that some detail of the Michigan program is otherwise faulty, that decision would, of course, be limited to the Michigan checkpoint program and would not mean that sobriety checkpoints are generally impermissible.

cannot, provide the same deterrent impact as a program incorporating both roving patrols and sobriety checkpoints.

First, many drivers who are not fearful of being caught by roving patrols are in fact fearful of being detected by sobriety checkpoints. As a NHTSA study explained:

> Drivers may believe that they stand little chance of being detected if they drive after drinking too much. They may believe that the police will not notice them or that they can drive carefully enough not to attract suspicion if they are noticed. But roadblocks, or safety checkpoints, counter this belief because the potential of a drunk driver being detected is increased.

NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 2 (DOT HS 806-476, 1983). Various surveys of motorists,[15] including one conducted by the Michigan Task Force, confirm this observation. See *supra* pages 6-7 (quoting results of Michigan survey).

Second, and somewhat related, sobriety checkpoints enable police to arrest some drivers who would not ordinarily be detected by a roving patrol. Roving patrols work if, and only if, at the precise moment that a driver is being observed, he drives his car in a way that creates a reasonable suspicion justifying a stop.[16] But "the ability

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[15] See Dickman, *Sobriety Checkpoints for DWI Enforcement: A Review of Current Research* 2 (DOT/NHTSA 1987); Lacey & Lucke, *Enforcement and Public Information Strategies for DWI General Deterrence: The Boise City, Idaho Experience: Final Report* 71, 81 (DOT/NHTSA 1987); Lynn, *An Evaluation of Thirteen Local Selective Enforcement Projects Designed to Reduce Drunken Driving in Virginia* 61 (Virginia Highway & Transportation Research Council 1985); Hingson, *1987 Massachusetts/New Hampshire Road Block Surveys* (Massachusetts Governor's Highway Safety Bureau 1987).

[16] See Vingilis & Salutin, *A Prevention Programme for Drinking Driving*, 12 Accid. Anal. & Prev. 267, 268 (1980) ("other drinking-drivers that may be potentially just as dangerous, may go undetected because they do not fit the classical pattern"); 4 W. LaFave, *Search and Seizure* 72-73 (2d ed. 1987) (given difficulty of detecting drug drivers through traditional means, "[i]t is by no means surprising . . . that it has been reliably estimated that only one of every 2,000 drinking drivers is apprehended").

of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance." *People v. Bartley*, 109 Ill.2d at 287, 486 N.E.2d at 886. In *Skinner*, the Court recognized that impaired rail employees "can cause great human loss before any signs of impairment become noticeable to supervisors or others." 109 S. Ct. at 1419. If that is true with respect to railway employees who are in continuous contact with others, it is certainly true with respect to drivers for whom the only possible chance of casual detection is the hope that an officer will observe the motorist during the precise moment of erratic driving. The enhanced possibility of detecting alcohol-impaired drivers at checkpoints does more than further the State's goal of detecting drunk driving; it also deters those who thought they could evade detection.

Moreover, there is evidence that sobriety checkpoints are considerably more effective than roving patrols in detecting drivers with a blood alcohol content ("BAC") under .15[17] These data further confirm the importance

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[17] *Commonwealth v. Tarbert*, 517 Pa. 277, 292, 535 A.2d 1035, 1042 (1987) ("'While those drunk drivers arrested by roving patrols average a .169 to .20 blood alcohol content (BAC) level, drunk drivers arrested at Delaware sobriety checkpoints averaged a .14 BAC level.'") (quoting *Commonwealth v. Leninsky*, 360 Pa. Super. 49, 60-61, 519 A.2d 984, 990-991 (1986)); *Lowe v. Commonwealth*, 230 Va. at 352, 337 S.E.2d at 277 (drunk drivers at checkpoints in use "were being detected at lower blood alcohol content levels than had previously been identified using routine patrol methods"). See also Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations: Final Report* 15 (DOT/NHTSA 1985) (checkpoints are much more effective in detecting drivers with BACs of .15 or lower and moderately more effective at detecting drivers with BACs between .15 and .19); Harris, Dick, Casey & Jarosz, *The Visual Detection of Driving While Intoxicated* 26-28 (DOT/NHTSA 1980) (evidence indicating that training in detecting visual cues of drunken driving caused statistically insig-

of sobriety checkpoints in facilitating arrests of, and in deterring, drivers with levels between the legal limit [18] and the levels at which drunk drivers can be readily detected through their erratic driving. There is, therefore, a clear and distinct category of legally intoxicated and frighteningly dangerous drivers [19] who are difficult, if not impossible, to detect through the "reasonable suspicion" standard by which roving patrols operate. Cf. *National Treasury Employees Union*, 109 S. Ct. at 1392 (traditional standards are of little help when Government seeks to "detect violations that rarely generate articulable grounds for searching any particular place or person"); *Skinner*, 109 S. Ct. at 1420 (requiring "particularized suspicion of drug or alcohol use would seriously impede" government's objectives); *Martinez-Fuerte*, 428 U.S. at 557 (discussing impracticality of trying to control influx of illegal aliens through roving patrols); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) ("doubtful that any other canvassing technique would achieve acceptable results").

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nificant amount of change in average BAC of persons arrested; mean remained at approximately .164).

[18] As of 1988, 41 States considered BAC levels of .10 or above illegal per se. Two States, Oregon and Utah, consider BAC levels of .08 or above illegal per se. See NHTSA, *Digest of State Alcohol-Highway Safety Related Legislation* (6th ed. 1988).

[19] See Moskowitz & Robinson, *Effects of Low Doses of Alcohol on Driving-Related Skills: A Review of the Evidence* 67 (DOT/NHTSA 1988) (discussing strong evidence that driving skills are impaired at BAC levels far below .15); Legislative Commission on Expenditure Review—State of New York, *Drinking Driver Program* 34 (1979) (describing effects of BACs in the .10 to .14 range as causing "difficulty in performing many gross motor tasks" and "definite impairment of mental faculties, memories, and judgment"). One study reports that drivers in this range are especially dangerous because they "do not appear to be aware of the increased risk brought on by inebriation and do not exhibit compensatory behavior." 1 Allen, Hogge, Schwartz & Stein, *The Effects of Alcohol on the Driver's Decision-Making Behavior: Final Report* 139-140 (1978).

Given these phenomena, as well as the obvious advantage that the high visibility of sobriety checkpoints affords in furthering public education and deterrence, it has surely been reasonable for the many States, such as Michigan, which have implemented sobriety checkpoint programs, to conclude that checkpoints can be important aspects of their overall programs designed to detect and deter drunk drivers. The Michigan courts ignored this wealth of information, however, choosing to focus exclusively on the number of arrests that checkpoints have facilitated.[20] In so doing, the Michigan courts fell into the classic trap of trying to evaluate a deterrent measure by looking at how many offenders are actually caught.[21] This Court explained in *National Treasury Employees Union* that "[w]hen the Government's interest lies in deterring highly hazardous conduct, a low incidence of

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[20] Michigan's primary claim is that sobriety checkpoints can lead to *long-term* general deterrence, a claim that cannot be disproved by focusing on short-term arrest or fatality rates. The trial court's dissection of the Maryland data, compiled over a three-month period, is, therefore, quite irrelevant. Pet. App. 84a-92a.

[21] To the extent that ratios are important, the number of drunk drivers arrested per drivers stopped at sobriety checkpoints compares quite favorably with the ratio of detection achieved in other programs that the Court has approved. During a sample period, the alien checkpoint in *Martinez-Fuerte*, for example, checked 146,000 vehicles, finding illegal aliens in 171 of them, or approximately 1/10 of 1%. See *Martinez-Fuerte*, 428 U.S. at 554. Likewise, in *National Treasury Employees Union*, the Court proceeded on the assumption that only 5 out of 3600 tests, again approximately 1/10 of 1%, had uncovered illegal drug use. 109 S.Ct. at 1394. The ratios produced by checkpoint programs have been considerably larger. During the one night of testing in Michigan, for example, 2 out of 126, or 1.6%, of the drivers who passed the checkpoints were arrested.

Statistics reported from other States indicate that this figure is only a bit higher than the typical experience (see Pet. App. 80a-83a), although one State reported a short-term arrest rate of 7%. See *State v. Garcia*, 481 N.E.2d at 154. These variations in results confirm the need for localized determination about whether sobriety checkpoints will prove effective.

such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." 109 S. Ct. at 1396; see also *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). As Justice Simon wrote for the Illinois Supreme Court: "Admittedly the possibility that a driver will face a roadblock on his way home will not discourage all drunk driving, but on the basis of common sense alone one must conclude that many persons aware of that prospect will have second thoughts about driving." *People v. Bartley*, 109 Ill. 2d at 287, 486 N.E.2d at 886.

C. Structured Sobriety Checkpoints Involve A Minimal Degree Of Intrusion And Interference.

Although structured checkpoints undoubtedly qualify as "seizures" under the Fourth Amendment, the Court has recognized that their "intrusion on Fourth Amendment interests is quite limited." *Martinez-Fuerte*, 428 U.S. at 557. Not only do individuals have diminished expectations of privacy in their automobiles, but these checkpoints involve "only a brief detention of travelers during which" the most that is required of the driver "'is a response to a brief question or two.'" *Id.* at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). At sobriety checkpoints, just as at the alien checkpoints upheld in *Martinez-Fuerte*, "[n]either the vehicle nor its occupants are searched." 428 U.S. at 558.

Some of these same characterizations apply to suspicionless stops by roving patrols as well. But two key factors reduce the Fourth Amendment concern with sobriety checkpoints and distinguish them from roving patrols such as those struck down in *Brignoni-Ponce* and *Delaware v. Prouse*, 440 U.S. 648 (1979): first, checkpoints do not afford individual officers discretion to decide which vehicles to stop; and, second, checkpoints generate far less concern and fright on the part of law-abiding drivers. Analysis of these two factors reveals that the degree of intrusion caused by sobriety checkpoints such as those contemplated by Michigan is virtually

identical to that involved in the checkpoint program that this Court upheld in *Martinez-Fuerte*.

1. *The sobriety checkpoints at issue here do not leave officers any discretion in determining which cars to stop.*

One of the primary goals of the Fourth Amendment is to limit the "unconstrained exercise of discretion" by government officials in determining whether a particular individual ought to be questioned or searched. *Delaware v. Prouse*, 440 U.S. at 663. When officers have unfettered authority to pull over motorists whom they "have a hunch" are driving suspiciously, the risks of abuse are great. Hence, the Court has announced that the "Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of that particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. at 51. The sobriety checkpoints at issue here clearly qualify under the second of these formulations.

The guidelines that define Michigan's sobriety checkpoint program effectively limit police discretion at every stage of the process. Sites for the checkpoints are selected with reference to the accident history of the locations as well as a variety of safety-related factors. Pet. App. 147a-150a. Uniformed officers working the site are given specific instruction on the operation of the checkpoint, including the precise "procedure to be followed in approaching a vehicle, the initial contact with its driver, and what to do in specific situations." *Id.* at 151a. To ensure compliance with these rules, the guidelines require that "[a] state police commissioned officer of Lieutenant rank or higher shall be the officer in charge at the sobriety checkpoint location." *Id.* at 157a. Most critically, the guidelines afford the officers absolutely no discretion in determining which cars to stop. While a checkpoint is in operation, "[a]ll traffic passing through the checkpoint

site shall be stopped" *Id.* at 154a.[22] Indeed, in their attempt to eliminate all police discretion in operating the checkpoints, Michigan's guidelines go so far as to prescribe a script for the officer to follow: "A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.'" *Id.* at 162a. If there is no evidence of intoxication, the officer is then directed to "hand the driver a brochure explaining the program, as well as a mail-back survey card, and direct the motorist on his/her way." *Id.* at 155a. Only in the event that the officer observes "articulable indications of intoxication" is the driver directed to a secondary check area for further investigation. *Ibid.*

This rigorous control of official discretion is exactly what this Court and dozens of state courts[23] have looked for in assessing whether a program constitutes a significant instrusion on Fourth Amendment interests. In *Delaware v. Prouse*, the Court struck down a roving patrol scheme under which an officer, having no reason to suspect that the driver was violating any law, and "not acting pursuant to any standards, guidelines, or procedures," decided to pull the driver over to check his driver's license and registration. 440 U.S. at 650. In condemning the seizure, the Court pointed out that either "an appropriate basis of suspicion directed at a particular automobile" or "some other substantial and

[22] In the event that "traffic congestion or other circumstances arise that warrant the discontinuing of the operation" the supervising officer "may close down the operation for any length of time necessary." Pet. App. 158a. This authority raises none of the risks associated with giving police the discretion to choose which drivers should be stopped.

[23] Most of the state courts to consider the constitutionality of sobriety checkpoints have upheld them (see Pet. App. 165a-168a (listing 22 states that have upheld checkpoints)), virtually always focusing on the existence of guidelines that eliminated police discretion in deciding whom to stop.

objective standard or rule to govern the exercise of discretion" was required in order to eliminate the dangers associated with the "unbridled discretion of law enforcement officials." *Id.* at 661. Consistent with this rule, the Court invited the States to develop programs that would serve their law enforcement needs while still preserving the Fourth Amendment value of limiting police discretion. The Court declared that it did not intend to "preclude the State of Delaware or other States from developing methods for spot checks that involve less instrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663; see also *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). There is no doubt that Michigan, and the great majority of other States that have devised sobriety checkpoints since *Prouse*, have complied with this direction.

In at least one sense, then, suspicionless stops at sobriety checkpoints are less constitutionally problematic than the alternative of stops by roving patrols based on particularized suspicion. Although this Court has upheld stops by roving patrols based on reasonable suspicion, there always remains the possibility that some officers will decide whom to stop based on arbitrary or discriminatory motives. Neutral checkpoints significantly minimize if not eliminate this risk, by subjecting all drivers to brief stops, and requiring officers to refer all drivers whom they suspect to a secondary checkpoint. The presence of supervisory officials at the scene of the checkpoint serves to ensure that these guidelines will be followed. It is the risk of abused discretion that is at the core of the Fourth Amendment; and although stops on particularized suspicion are obviously permissible, the Court should not reject a State's decision to adopt an alternative plan, such as sobriety checkpoints, that all but eliminates the risks of abused discretion.

2. *Sobriety checkpoints result in only minimal objective and subjective intrusion into Fourth Amendment interests.*

The second factor that the Court has deemed critical in assessing routine stops for inquiry is the extent of the actual interference and intrusion that motorists experience. Whether the focus is on the objective element of the stop or the subjective issues of fear and fright that some seizures can cause, sobriety checkpoints cause only minimal intrusions, even less than those associated with the routine searches and seizures that this Court has upheld.

On the objective level, the trial court found that the "average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds." Pet. App. 103a. The court also noted that the "intensity of the investigation by the police during this 30 second time period was not great, inasmuch as the police were directed only to observe the driver for signs of intoxication." *Id.* at 104a. In light of these findings, the trial court concluded "that the objective nature of the intrusion was minimal." *Ibid.*

This conclusion is indisputable, especially when the intrusiveness of sobriety checkpoints is compared to the intrusions that the Court has deemed minor or brief in other cases. In *Martinez-Fuerte*, for example, the Court described the "brief" detention involved when " 'all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.' " 428 U.S. at 558 (quoting *Brignoni-Ponce*, 422 U.S. at 880). Even though some drivers were being diverted for average periods of three to five minutes and their papers were examined, the Court considered the intrusion sufficiently slight to minimize any Fourth Amendment concerns. *Martinez-Fuerte*, 428 U.S. at 547, 563.[24] The unin-

[24] The average of three to five minutes was for those cars diverted to secondary checkpoint areas. But because the referrals to secondary checkpoints in *Martinez-Fuerte* were made in the absence of any particularized suspicion, the Court had to address whether this amount of time constituted an undue intrusion for a routine questioning program. The sobriety checkpoints at issue here are very different; referrals to secondary areas are made only on the basis of articulable and reasonable suspicion, the same quantum of suspicion that would justify a stop by a roving patrol officer under *Delaware v. Prouse*, 440 U.S. at 663.

trusiveness of sobriety checkpoints is even more striking when compared to the routine blood, urine, and breath testing that the Court sustained last Term in *National Treasury Employees Union* and *Skinner*.

The subjective nature of the intrusion caused by sobriety checkpoints is also quite minimal, and compares favorably with the routine checking programs that this Court has upheld. In *Martinez-Fuerte*, the Court focused on the "subjective intrusion—the generating of concern or even fright on the part of lawful travelers" in explaining how checkpoints are constitutionally different from roving patrols, such as those that the Court struck down in *Brignoni-Ponce*. The Court declared that the

> "circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."

Martinez-Fuerte, 428 U.S. at 558 (quoting *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975)).

The sobriety checkpoint program at issue here provides all of the safeguards against fear and fright that the *Martinez-Fuerte* program did. Beginning approximately a quarter of a mile before the checkpoint, official signs are posted to notify motorists that they are entering a sobriety checkpoint area. Pet. App. 108a. The Michigan guidelines further require that "[w]arning signs, flares, cones, and/or emergency lighting equipment will be utilized and

conspicuously displayed to provide adequate notice." *Id.* at 153a. At the checkpoints themselves, the presence of a significant number of officers, including command personnel, an approach safety officer, observation officers, data collection officer, lane safety officer, checkpoint contact officer, and, if necessary, support personnel (*id.* at 157a-164a), make it apparent to any motorist that there is an official police activity in process, and that no single motorist is being singled out for suspicion. These indicia of authority and neutrality eliminate the fear and anxiety that might accompany being pulled over by a lone marked or unmarked police vehicle.

The trial court nonetheless concluded that Michigan's sobriety checkpoint program could cause significant fear and fright among motorists because, unlike the permanent checkpoint upheld in *Martinez-Fuerte*, the sobriety checkpoint would move from night to night, and motorists would be unable to anticipate where the checkpoint is located. There is no constitutional substance to this distinction between temporary and permanent checkpoints. As the New York Court of Appeal explained in unanimously upholding its State's sobriety checkpoint program:

> The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails—signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars.

People v. Scott, 63 N.Y. 2d at 527, 483 N.Y.S.2d at 653, 473 N.E.2d at 5; see also *United States v. Hernandez*, 739 F.2d 484, 488 (9th Cir.) (no constitutional difference between temporary and permanent checkpoints),

cert. denied, 469 U.S. 1021 (1984); *Little v. State*, 300 Md. at 507-508, 479 A.2d at 914 (temporary nature of checkpoints does not make them analogous to roving patrols). The factors that minimized fear and fright in *Martinez-Fuerte* were the "public and relatively routine nature" of the stops, and these identical factors minimize fear and fright associated with sobriety checkpoints.[25] Indeed, a number of studies have documented the essentially favorable reaction among motorists who have been subject to brief sobriety checkpoints.[26]

In assessing the slight intrusion associated with sobriety checkpoints, the Court should consider the much greater intrusion that roving patrols cause when an officer pulls over a driver whom he suspects is intoxicated. If this Court were to invalidate sobriety checkpoints, many state and local governments would be forced to respond by stepping up the use of roving patrols. And because reasonable suspicion is far from certainty, any increase in the use of roving patrols will necessarily also result in an increase of false positive stops—more and more drivers will be subjected to the fear, fright, and embarrassment of being pulled over by roving patrols who mistakenly believed that they observed erratic driving indicative of drunkenness. When this intrusion is compared with the 25- or 30-second routine stops involved here, it becomes

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[25] The trial court identified numerous other distinctions between temporary and permanent roadblocks, but none of these rises to constitutional significance. For example, the fact that drivers may be better able to evade permanent checkpoints should certainly not weigh in favor of their legitimacy.

[26] See Michigan Drunk Driving Task Force, *Final Report* 13 (1985); NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 15 (DOT HS 806-476, 1983); Soble, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 Mich. J. Law. Ref. 489, 490 n.6 (1988). See also *Martinez-Fuerte*, 428 U.S. at 561 n.14 ("practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use"). This Court has suggested that widespread public acceptance of a neutral program such as this is a significant factor in assessing its reasonableness. See *Camara v. Municipal Court*, 387 U.S. at 537.

clear that sobriety checkpoints are not only an effective way of detecting and deterring drunk driving but that, on balance, they may well be the least constitutionally problematic way of detecting and deterring drunk driving.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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November 16, 1989